IN THE

Supreme Court of the United States

October Term, 1977

No. 76-930

DIXY LEE RAY, Governor of the State of Washington, *et al.*,
Appellants,

v.

ATLANTIC RICHFIELD COMPANY, *et al.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

MOTION AND BRIEF OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES, *AMICUS CURIAE*

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Maritime Law Association of the United States respectfully moves the Court for permission to file the annexed Brief, as *Amicus Curiae.*

The nature of the Association and its intense interest in this vitally important appeal are outlined in the opening pages of the Brief, to which the Court is respectfully referred.

The Association believes the Brief may be of assistance to the Court in reaching its decision, as it focuses attention

on the effect of the "Admiralty" Clause of the Constitution (Article III, Section 2, Clause 3) on the issues involved, whereas Appellees will presumably emphasize the effect of the "Supremacy" Clause (Article VI), and the "Commerce" Clause (Article I, Section 8, Clause 3), as they did below.

Appellants Dixy Lee Ray, Governor of the State of Washington, and David S. McEachran, Esq., Whatcom County Prosecuting Attorney, and Appellees Atlantic Richfield Company and Seatrain Lines, Inc. have consented to the filing of the annexed Brief. Appellant Christopher T. Bayley, Esq., King County Prosecuting Attorney, has indicated consent on condition that the Brief adheres to the Pre-trial Order and does "not introduce any factual or evidentiary material". The Brief is in conformity with this condition. The Attorneys for the other Appellants have not as yet responded to a request for their consent.

Respectfully submitted,

DAVID R. OWEN, *President*

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Committee on Uniformity of
United States Maritime Law

Attorneys for the Maritime
Law Association of the United
States, Amicus Curiae

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BRIEF OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES, *AMICUS CURIAE*

Interest of *Amicus Curiae*

The Maritime Law Association of the United States (the Association) is a national bar association founded in 1899, with a nationwide membership of more than 2,200 practicing admiralty attorneys, federal judges, professors of admiralty law, and others interested in the martime law. It is an affiliate of the American Bar Association and is represented in that association's House of Delegates. The Association's attorney members represent the full range of

maritime interests: shipowners, charterers, cargo owners, seamen, passengers, owners of shore-front properties, marine insurance underwriters, the federal and a number of state and local governments, and other actual or potential maritime litigants. Its purposes are set forth in its Articles of Association:

> The objects of the Association shall be to advance reforms in the Martime Law of the United States, to facilitate justice in its administration, to furnish a forum for the discussion and consideration of problems affecting the Maritime Law and its administration, and to act with foreign and other associations in efforts to bring about a greater harmony in the Shipping Laws, regulations and practices of different nations.

In furtherance of these objectives the Association has sponsored such federal maritime legislation as the Salvage Act (1912),[1] the Carriage of Goods by Sea Act (1936)[2] and the Admiralty Extension Act (1948),[3] and has cooperated with Congressional committees in the formulation of other maritime legislation, including the Water Quality Improvement Act of 1970,[4] the 1972 Water Pollution Control Act Amendments,[5] the implementation of the 1972 Convention for Preventing Collisions at Sea,[6] and the Federal Court Jurisdiction Bill.[7] From time to time the Association recommended improvement in the former General Admiralty Rules to this Court, and in the 1960's it assisted the Court's

[1] 46 U.S.C. §§ 727-31.
[2] 46 U.S.C. §§ 1300-15.
[3] 46 U.S.C. § 740.
[4] 84 Stat. 91-107, *as amended* 33 U.S.C. §§ 1251-1376.
[5] 33 U.S.C. §§ 1251-1376.
[6] — U.S.T. —, T.I.A.S. No. 8587 (effective July 15, 1977). *See generally* H.R. 5446, 94th Cong., 1st Sess.
[7] S. 1876, 93d Cong., 1st Sess.

Advisory Committee on Admiralty Rules in the unification of the General Admiralty Rules and the Federal Rules of Civil Procedure.

The Association has actively participated, as one of the 34 national maritime law associations constituting the Comité Maritime International,[8] in the movement to achieve maximum international uniformity in martime law through the medium of international conventions, such as those relating to Assistance and Salvage (1910),[9] Ocean Bills of Lading (1924),[10] Collision (1910),[11] Limitation of Liability of Owners of Sea-Going Vessels (1957),[12] Maritime Liens and Mortgages (1968),[13] and Civil Liability for Oil Pollution Damage (1969),[14] and standard contractual provisions such as the York-Antwerp Rules of 1974.[15]

A first step toward achievement of the Association's objective of international harmony in the maritime laws of the world's trading nations must be a uniform national martime law in those of them which, like the United States, have a federal system of Government. Until very recent years such uniformity was the unquestioned national policy, as expressed by the Congress and acknowledged repeatedly

[8] These now include the national associations of Argentina, Australia, Belgium, Brazil, Bulgaria, Canada, Chile, Denmark, Finland, France, Federal Republic of Germany, German Democratic Republic, Greece, India, Ireland, Israel, Italy, Japan, Jugoslavia, Mexico Morocco, The Netherlands, Norway, Poland, Portugal, Spain, Sweden, Switzerland, Turkey, United Kingdom, United States, Uruguay, Union of Soviet Socialist Republics, and Venezuela.
[9] 37 Stat. 1658 (1913).
[10] 51 Stat. 233 (1937).
[11] 6 Knauth's Benedict on Admiralty 37 (7th ed., rev.) [hereinafter "Benedict"].
[12] 6A Benedict 634.
[13] Singh, International Conventions of Merchant Shipping (8 B.S.L.) 1397 (2d Ed. 1973). See generally 6A Benedict 601-607.
[14] 6A Benedict 951.
[15] 2 Benedict § 181.

in the decisions of this Court. The Association has therefore been greately disturbed by the growing tendency of state legislatures to enact disparate laws in the maritime field. Accordingly, at the Association's 1975 Annual Meeting the following Resolution was unanimously adopted:

> RESOLVED, that the Maritime Law Association of the United States considers it of the utmost importance and in the public interest that martime law be uniform to the maximum extent possible throughout the United States; it is greatly concerned about, and strongly opposes the current proliferation of disparate state and local legislation adversely affecting such uniformity and advocates that Congress consider the matter and enact legislation designed to protect and maintain national uniformity in maritime law.

Substantially identical resolutions were also adopted at the 1976 Annual Meeting of the American Bar Association, and at the 1975 Annual Meeting of the Propeller Club of the United States (a national association of persons interested in all phases of maritime commerce).

The Association's members are fully cognizant of the need for a clean marine environment. Broad, enforceable, uniform national laws and international conventions designed to prevent water pollution to the extent possible, and to provide the means for removing such discharges of oil and other polluting substances as may occur, have received and continue to receive the enthusiastic support of the Association, as well as that of other responsible groups concerned with marine ecology.

In questioning the constitutionality of the Washington State "Tanker Law" (Chapter 125, 1975 Laws of the State

of Washington, §§ 88.16.170 *et seq.*, Rev. Code of Washington), the Association is in no way withdrawing its support for sound legislation designed to improve the marine environment; it is simply urging that by its very nature the sea is international, and that until such time as international uniformity can be fully achieved, the public, as well as those interested in all phases of maritime commerce, can best be served if such regulation is federal, and not the "crazy-quilt regulation of the different States".[16]

ARGUMENT

The District Court Correctly held the Washington State Tanker Law unconstitutional, and its decision should be affirmed.

In the Association's submission, the three-judge district court was entirely correct in holding the Tanker Law unconstitutional for the reason that it "conflicts with federal law preempting the same subject matter". Indeed, one of these conflicts—that between section 2 of the Tanker Law and the Federal Pilotage Statute, 46 U.S.C. § 364—is now conceded by Appellants. See Appellant's Brief, p. 10n.9.

The Association submits that the Tanker Law is invalid for the further reasons that it imposes undue burdens on interstate and foreign commerce, infringes upon the federal treaty-making power, and violates international treaty obligations assumed by the national Government.

These conflicts were thoroughly discussed by Appellees in their District Court brief, and will undoubtedly be discussed with equal thoroughness in their brief on this appeal. It would therefore be an unnecessary imposition on the

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[16] Frankfurter, J., in his concurring opinion in *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 323 (1955).

Court's time for the Association to analyze them in any detail. The Association will therefore limit itself to citing one example of the serious conflicts between the Tanker Law and federal maritime legislation—the conflict between Section 3 and the Ports and Waterways Safety Act of 1972 ("PWSA"), 33 U.S.C. §§ 1221-1227 and 46 U.S.C. § 391a.

Section 3 of the Tanker Law is plainly unconstitutional in unqualifiedly prohibiting the entry into Puget Sound of all oil tankers in excess of 125,000 deadweight tons ("DWT") and prohibiting the entry of loaded oil tankers of 40,000 to 125,000 DWT unless they carry the special equipment specified in the Section, or, alternatively, are under tug escort of a kind prescribed in the Section.

PWSA provides for a comprehensive regulatory scheme controlling vessel movements and establishes standards for the design and construction of oil tankers—precisely the same subjects as the Tanker Law is designed to regulate.

Among the announced purposes of PWSA are the protection of "the navigable waters and the resources therein from environmental harm", 33 U.S.C. § 1221, and the prevention or mitigation of "hazards to life, property, and the marine environment." 46 U.S.C. § 391a. The announced reasons for enactment of the Tanker Law closely parallel these purposes of PWSA. See Ch. 125, Rev. Code of Washington, § 88.16.170. It cannot be said, therefore, as was said in *Huron Portland Cement Co. v. City of Detroit,* 362 U.S. 440 (1960), that there is no overlap between the scope of the federal law and that of the state legislation because their purposes are different. Here, the purposes are substantially the same, and the environmental purpose of the Tanker Law was plainly preempted by PWSA.

PWSA authorizes the Secretary of Transportation ("Secretary") to deny entry into the navigable waters

of the United States to tankers in violation of design and construction standards established by the Secretary (46 U.S.C. § 391a [13]) and to establish limitations on the size of vessels using congested waterways such as Puget Sound (33 U.S.C. § 1221[3] [iii]). Therefore, unless and until the Secretary prohibits tankers in excess of 125,000 DWT from entering Puget Sound, they must be free to do so, provided they meet design and construction standards established by the Secretary. In completely prohibiting the entry of such Tankers into Puget Sound, Section 3(1) of the Tanker Law is in outright conflict with PWSA.

Pursuant to authority delegated by the Secretary under PWSA (46 U.S.C. § 391a[7]), the United States Coast Guard has established rules and regulations "for the protection of the marine environment", establishing design and construction standards for oil tankers engaged in the coastwise trade. 40 Fed. Reg. 48,280 (Oct. 14, 1975), 33 C.F.R., Part 157, *amended,* 41 Fed. Reg. 1,479 (Jan. 8, 1976). These standards differ widely from the design and construction standards which tankers of 40,000 to 125,000 DWT must meet as a condition to using the waters of Puget Sound without a tug escort of the kind prescribed in the proviso to Section 3(2) of the Tanker Law. By implication, coastwise tankers complying with Coast Guard design and construction standards must be free to navigate in Puget Sound, and the Tanker Law is in direct conflict with PWSA in denying them access unless accompanied by special tug escorts, if they do not comply with the standards established in the Tanker Law—standards which, it should be noted, cannot be met by any 40,000 to 125,000 DWT tanker in service today.

The fact that Section 3(2) of the Tanker Law contains a proviso permitting the entry of loaded 40,000 to 125,000 DWT tankers not designed and equipped in accordance

with the Section *if* escorted by tugs of specified horsepower does not resolve the conflict between that Section and PWSA. Under PWSA, 33 U.S.C. § 1221 (3) (iii) and (iv), the Secretary is authorized to control traffic in especially hazardous areas, "or under conditions of reduced visibility, adverse weather, vessel congestion, or other hazardous circumstances by *** (iii) establishing vessel size and speed limitations and vessel operating conditions; and (iv) restricting vessel operation, in a hazardous area or under hazardous conditions, to vessels which have particular operating characteristics and capabilities which he considers necessary for safe operation * * *." The Coast Guard, to whom the Secretary's authority was delegated, has adopted Rules and Regulations for Vessel Traffic Systems in Puget Sound, 39 Fed. Reg. 25,430 (July 10, 1974), 33 C.F.R. §161, Subpart B. These Rules and Regulations do not require either the design and construction features specified in Section 3(2) of the Tanker Law for loaded tankers of 40,000 to 125,000 DWT or the tug escorts required by the proviso to that Section when such tankers are not so designed and constructed. Since it is implicit in PWSA that vessels which comply with the Rules and Regulations issued thereunder with respect to a particular waterway will be permitted to use it, and since Section 3(2) of the Tanker Law would deny access to vessels complying with the Coast Guard Rules and Regulations but not with that Section, the Tanker Law is plainly invalid as in conflict with the Coast Guard Rules and Regulations relating to Puget Sound, issued under PWSA. The fact that the federal regulations may not be as restrictive as those of the Tanker Law is of no significance; the area is one regulated by federal statutes and rules enacted and promulgated pursuant to the Constitution. The Tanker Law is therefore preempted by the federal regulatory

scheme. *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 236 (1947).

Even if an intention to preempt had not been expressed in PWSA, such an intention would be plainly implied from the comprehensive regulatory scheme embodied in that statute, as the foregoing discussion shows. But an intention to preempt was in fact expressed in PWSA. After authorizing the Secretary to regulate shoreside structures as well as vessels, PWSA provides that it is not intended to preclude the states from establishing "*for structures only*"[17] higher safety standards than the Secretary might prescribe. 33 U.S.C. § 1222(b)(1). It is clear from this language, and made doubly so by the legislative history of PWSA, that it was intended to permit the states to go beyond federal requirements in establishing safety standards *for shoreside structures*, and, conversely, to prohibit the states from going beyond federal requirements *with respect to vessels*. See H.R. Rep. No. 92-563, 92d Cong., 1st Sess. 15 (1971), where, in referring to the phrase "for structures only", it is stated that this language was inserted in the bill which became PWSA to make "*absolutely clear the intent of Congress to preempt state regulation of vessels.*"

Askew v. *American Waterways Operators, Inc.*, 411 U.S. 325 (1973), is clearly distinguishable, for the reason, among others, that the federal Water Quality Improvement Act of 1970,[18] which, like the State Statute there involved, was concerned with oil pollution, contained an express disclaimer of any intention to preempt. PWSA, on the other hand, as has been shown, contains an express preemption provision.

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[17] Emphasis throughout has been supplied, except where otherwise indicated.

[18] 84 Stat. 91-107, as amended 33 U.S.C. §§ 1251-1376.

In the main, the federal statutes and regulations with which the Tanker Law is in conflict relate to interstate and foreign commerce, and they are therefore clear expressions of the constitutional grant of authority to regulate such commerce. But even when interstate and foreign commerce is *not* involved, such federal statutes and regulations are authorized by the Admiralty [19] and "Necessary and Proper" [20] Clauses of the Constitution. It has long been established that those clauses, in combination, not only form the source of the admiralty jurisdiction of the federal judiciary, but vest Congress and the federal courts with the paramount power to determine the substantive maritime law to be applied throughout the United States. *The Thomas Barlum*, 293 U.S. 21 (1934) ; *Wilburn Boat Co.* v. *Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955).

The effect of the Admiralty Clause was explained by this Court in *The Lottawanna*, 88 U.S. 558, 574-75 (1876), more than a century ago:

> • • • The general system of maritime law which was familiar to the lawyers and statesmen of the country when the Constitution was adopted, was most certainly intended and referred to when it was declared in that instrument that the judicial power of the United States shall extend 'to all cases of admiralty and maritime jurisdiction'. • • • One thing, however, is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law

[19] Article III, Section 2, Clause 3.
[20] Article I, Section 8, Clause 18.

> under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.

This Court has repeatedly held that the substantive maritime law is subject to modification by Congress "as experience or changing conditions might warrant". *Panama R. R. Co.* v. *Johnson*, 264 U.S. 375 (1924); *Crowell* v. *Benson*, 285 U.S. 22, 39 (1932); *The Thomas Barlum, supra.*

Since Congress has paramount power to legislate in the maritime field, federal maritime legislation is the supreme law of the land, and under the Supremacy Clause,[21] no state statute is valid if it contravenes such legislation. Thus, since the Judiciary Act of 1789 [22] made the jurisdiction of the United States district courts exclusive in civil admiralty proceedings *in rem*, the states are powerless to grant their own courts jurisdiction of such proceedings. *The Moses Taylor*, 71 U.S. 411 (1866). Similarly, a state arbitration statute may not validly be applied by a state court to enjoin enforcement of an arbitration provision of a maritime contract on grounds of time bar, since such provisions are governed by the Federal Arbitration Act,[23] whereunder an issue of timeliness must be decided by the arbitrators. *Matter of A/S Ludwig Mowinckels Rederi and Dow Chemical Co.*, 25 N.Y. 2d 376 (1970).

State legislation in the maritime area is constitutionally permissible only if it is not hostile "to the characteristic features of the maritime law or inconsistent with federal

[21] Article VI, Clause 2.
[22] 1 Stat. 76-66.
[23] 9 U.S.C. §§ 1-208.

legislation". *Just* v. *Chambers*, 312 U.S. 383 (1941), quoted with approval in *Askew* v. *American Waterways Operators, Inc., supra.*

As Justice Frankfurter stated in *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354 (1959), "state law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system."

Even in an area of purely "local concern",[24] wherein national uniformity is *not* mandated, state legislation will be immediately preempted once Congress enacts federal legislation covering the same area. Thus, since there was no federal legislation governing maritime liens for necessaries furnished to vessels in their home ports before 1910, and since the matter was *not* considered one requiring national uniformity, state legislation creating maritime liens on domestic vessels for necessaries so furnished was upheld. *The Orleans*, 36 U.S. 175 (1837). But in 1910, Congress enacted the first Federal Maritime Lien Act,[25] thus preempting the field, and thereafter all state maritime lien statutes were immediately invalidated to the extent they related to necessaries covered by the Federal Act. *Piedmont, etc. Coal Co.* v. *Seaboard Fisheries Co.*, 254 U.S. 1, 11 (1920); *Dampsk. Dannebrog* v. *Signal Oil & Gas Co.*, 310 U.S. 268 (1940).

Nothing said in either *Wilburn Boat Co.* v. *Fireman's Fund Ins. Co., supra*, or *Askew* v. *American Waterways Operators, Inc., supra*, alters these fundamental rules. As

[24] While at a very early stage this Court had upheld state legislation in maritime areas wherein it did not consider national uniformity essential, the term "local concern" appears to have been employed by the Court for the first time in *Grant Smith-Porter Ship Co.* v. *Rohde*, 257 U.S. 469 (1922).

[25] See 46 U.S.C. § 971.

stated by Justice Black, writing for a majority of five justices in *Wilburn*:

> Congress has not taken over the regulation of marine insurance contracts and has not dealt with the effect of marine insurance warranties at all; *hence there is no possible question here of conflict between state law and any federal statute.* But this does not answer the questions presented, since in the absence of controlling Acts of Congress this Court has fashioned a large part of the existing rules that govern admiralty. And States can no more override such judicial rules validly fashioned than they can override Acts of Congress. Consequently the crucial questions in this case narrow down to these: (1) Is there a judicially established federal admiralty rule governing these warranties? (2) If not, should we fashion one? (348 U.S. at 314).

Justice Black answered both of these questions in the negative.

Justice Frankfurter, concurring in the result, thought the majority opinion was based on grounds much too broad. He said the "question, and only question to be decided [was] whether the demands of uniformity relevant to maritime law require that marine insurance on a houseboat yacht brought to Lake Texoma for private recreation should be subject to the same rules of law as marine insurance on a houseboat yacht 'confined', after arrival, to the waters of Lake Tahoe or Lake Champlain."

Justice Reed, joined by Justice Burton in a dissenting opinion, disagreed with the majority on both counts; in his view, there *was* a clearly defined rule of maritime law governing marine insurance warranties, but even if none existed, it would be for this Court, rather than the state

legislatures, to fashion such a rule. In referring to the Admiralty Clause, he said:

> Although congressional authority over maritime trade was not expressly granted by the Constitution, the grant of admiralty jurisdiction together with the Necessary and Proper Clause has been found adequate to enable Congress to declare the prevailing maritime law for navigable waters throughout the Nation. The Commerce Clause aids where interstate commerce is affected, but has not the scope of 'navigable waters'. * * * (348 U.S. at 329).
>
> * * * State power may be exercised where it is complementary to the general admiralty law. It may not be exercised where it would have the effect of harming any necessary or desirable uniformity. * * * The cases decided by this Court make it plain that state legislation will not be permitted to burden maritime commerce with variable rules of law that destroy that uniformity. * * *
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> * * *
>
> *It is not only in markings, lights, signals, and navigation that States are barred from legislation interfering with maritime operation.* * * * If uniformity is needed anywhere, it is needed in marine insurance. *It is like the question of seaworthiness which must be controlled by one law.* (348 U.S. at 332-333).

It will thus be seen that all three opinions in *Wilburn Boat* majority, concurring and dissenting—recognized three fundamental principles:

> (1) No state maritime legislation is constitutional if it contravenes a judically established rule of the general maritime law;
>
> (2) Where there is neither federal legislation nor a judicially established rule of the general maritime law governing a particular area, this Court may fashion such a rule, and will do so if it considers the area one wherein national uniformity is desirable, whereupon any conflicting state legislation will be superseded;
>
> (3) No state maritime legislation is contitutional in an area which has been preempted by federal legislation.

The *Wilburn Boat* Court divided, *not* on any of these three principles, but on the application of the first and second to the particular problem before it. There was no division with respect to the third principle; all eight justices who heard the case agreed that Congress had the power to regulate marine insurance warranties, and that if it had done so, the state statute would have been invalid insofar as it concerned such warranties.

In *Askew* v. *American Waterways Operators, Inc., supra,* involving the constitutionality of the Florida Oil Spill Prevention and Pollution Control Act,[26] it was not argued that Congress had preempted the area of civil liability for oil pollution damage. The Federal Water Quality Improvement Act ("W.Q.I.A."),[27] (since superseded by the 1972 Water Pollution Control Act Amendments),[28] imposed penalties for discharges of oil and civil liability for removal costs incurred by the Government, but neither that Act nor any other federal legislation was concerned

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[26] Ch. 70-224, Laws of Florida, 1970. Ch. 376, Fla. Stat. Ann. (1973), *as amended* 26 Fla. Stat. Ann. §§ 376.011-376.21 (Supp. 1977).

[27] 84 Stat. 91-107, *as amended* 33 U.S.C. §§ 1251-1376.

[28] 33 U.S.C. §§ 1251-1376.

with liability for shoreside damage caused by discharges of oil from vessels. The three-judge court that had invalidated the Florida statute in *Askew* did so, not on the ground of preemption, but because, in the court's view, the statute was an invasion of an area of maritime law wherein the Constitution required national uniformity and harmony. See *American Waterways Operators, Inc.* v. *Askew*, 335 F. Supp. 1241 (M.D.Fla. 1971).

In holding that in the absence of federal legislation regulating liability for pollution damage to shoreside property a state may validly regulate it, Justice Douglas appears to have treated such liability as a matter of "local concern", since he quoted with approval from *Just* v. *Chambers, supra,* holding that a state may modify or supplement the maritime law *provided the state legislation is not hostile "to the characteristic features of the maritime law or inconsistent with federal legislation."*

Thus, in *Askew,* this Court upheld the Florida statute (1) because there was no federal legislation regulating the liability which it imposed, and (2) in the Court's view, the state legislation before it was *not* hostile to the characteristic features of the maritime law. In reaching this second conclusion, the Court evidently concluded that lower federal court decisions [29] imposing liability for oil pollution damage did not constitute a sufficiently well established body of federal decisional law to preclude application of state legislation regulating such liability.

In *Askew,* the State authorities interpreted the Florida Act as imposing liability for pollution damage without

[29] See *Fireman's Fund Ins. Co.* v. *Standard Oil Co.*, 339 F.2d 148 (9th Cir. 1964); *In re New Jersey Barging Corp.*, 168 F. Supp. 925 (S.D.N.Y. 1958); *State of California* v. *The Bournemouth*, 307 F. Supp. 922 (C.D. Cal. 1969); *Salaky* v. *Atlas Barge No. 3*, 208 F.2d 174 (2d Cir. 1953); Sweeney, *Oil Pollution of the Oceans*, 37 Ford. L. Rev. 155, 168-81 (1968).

limitation as to amount, and urged this Court to overrule *Richardson* v. *Harmon,* 222 U.S. 96 (1911), which held the Federal Limitation of Liability Act [30] applicable to damage caused by vessels to shoreside property.[31] But this Court found it unnecessary to construe the statute insofar as limitation of liability was concerned. Justice Douglas stated:

> The Solicitor General [of the United States, *amicus curiae*] says that while the Limited Liability Act, *so far as vessels are concerned,*[32] would override § 12 of the Florida Act by reason of the Supremacy Clause, the Limited Liability Act has no bearing on "facilities" regulated by the Florida Act. Moreover, § 12 has not yet been construed by the Florida courts and it is susceptible of an interpretation *so far as vessels are concerned* which would be in harmony with the Federal Act. Section 12 does not *in terms* [33] provide for unlimited liability. (411 U.S. at 331)

The provisions of the Florida statute in *Askew* most closely resembling those of the Washington Tanker Law were those requiring the installation of State-approved "containment gear" on vessels using Florida ports and the manning of such vessels with crews trained in the use of such gear.[34] Up to the time *Askew* was decided the Florida authorities had not issued the regulations authorized by the statutory provisions, and this Court therefore

[30] 46 U.S.C. §§ 183-189.

[31] Brief of Appellants Askew *et al.*, pp. 65-69.

[32] Emphasis is the Court's.

[33] Emphasis is the Court's.

[34] Sec. 7, Laws of Florida, 1970, Ch. 376, Fla. Stat. Ann. (1973), *as amended* 26 Fla. Stat. Ann. §§ 376.011-376.21 (Supp. 1977).

specifically declined to pass upon the constitutionality of those provisions. In this connection Justice Douglas stated:

> Nor can we say at this point that regulations of the Florida Department of Natural Resources requiring "containment gear" pursuant to § 7(2) (a) of the Florida Act would be *per se* invalid because the subject to be regulated requires uniform federal regulation. Cf. Huron Portland Cement Co. v. Detroit, 362 U.S. 440 (1960). Resolution of this question, as well as the question whether such regulations will conflict with Coast Guard regulations promulgated on December 21, 1972, pursuant to § 1161(j) (1) of the Federal Act, 37 CFR § 28250, should await a concrete dispute under applicable Florida regulations. (411 U.S. at 336-337).

Askew, like *Wilburn Boat, supra*, thus restates the rule that state laws and regulations are invalid if they conflict with federal laws or regulations.

It is significant that the Florida statute upheld in *Askew* proved to be unworkable; shipowners generally were unable to comply with its insurance requirements and in some instances cargoes had to be discharged at ports in neighboring states and trucked to Florida. The statute was therefore drastically amended in 1974, and its most burdensome features, including its insurance and unlimited liability provisions, were deleted.[35]

Appellants' arguments that the states are more familiar with local navigational problems than the federal Government and therefore better equipped to cope with them will not bear scrutiny. The federal authorities of course

[35] *See* Pollutant Spill Prevention and Control Act, 26 Fla. Stat. Ann. §§ 376.011-376.21 (Supp. 1977), *amending* Ch. 376, Fla. Stat. Ann. (1973).

take local conditions into account. Thus, while pilots on vessels engaged in coastwise trading must be federally licensed, a prospective pilot must pass an examination concerning the problems of navigation in the particular port or waterway for which he seeks a license. The Coast Guard is not confined to an office in Washington, D.C., but has a Captain of the Port stationed in each of the major port cities. While the navigational laws and regulations are federal, special rules apply in particular areas, *e. g.*, the Great Lakes[36] and the Mississippi and its tributaries.[37] The Coast Guard has a long history of close cooperation with State authorities in solving maritime problems of a local nature. Moreover, the Coast Guard and other federal agencies are able to draw on experience acquired in one area in formulating rules to be applied in another with similar problems. The authorities of the several states cannot possibly acquire similar experience, as their activities must necessarily be confined to their own waters. Its experience has given the Coast Guard an unsurpassed expertise in vessel design and construction, and in oil pollution prevention and control.

In the Association's view, therefore, the Washington Tanker Law is not only invalid but unwise. The environmental problems it seeks to minimize can best be dealt with by the national Government, as the Constitution itself mandates.

[36] 33 U.S.C. §§ 241-295; 33 C.F.R. §§ 90.01-90.30.
[37] 33 U.S.C. §§ 301-356; 33 C.F.R. §§ 95.01-95.80.

CONCLUSION

The judgment of the District Court declaring the Washington State Tanker Law unconstitutional should be affirmed, and the stay of its order permanently enjoining enforcement of the law should be vacated.

Respectfully submitted,

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